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## Is There Really a Sex Bureaucracy?

Suzanne B. Goldberg\*

### ABSTRACT

This essay identifies several features of the higher-education context that can enrich *The Sex Bureaucracy*'s account of why colleges and universities have adopted new policies and trainings to address sexual assault on their campuses. These features include: 1) schools' preexisting systems for addressing student conduct; 2) the shared interest of schools in reducing impediments to education, including nonconsensual sexual contact; and 3) the pedagogical challenges of developing trainings that are engaging and effective. Taking these three factors into account, we can see that while federal Title IX intervention has had a profound effect, it is also important not to overstate law's ability to shape culture and interpersonal interactions and, instead, to recognize the confluence of factors that have generated and will continue to support change.

Introduction .....	108
I. The Student Policy Bureaucracy .....	109
II. The Higher-Education Mission: Supporting Student Learning .....	112
A. Schools' Interest in Improving the Learning Experience.....	112
B. The Power of Environmental Factors (Other Than OCR):	
New Data, Student Activism and the Endowment Effect .....	114
III. Policy Training and Pedagogy .....	117
Conclusion.....	121

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\* Herbert and Doris Wechsler Clinical Professor of Law, Columbia Law School. With thanks to Vicki Jackson, Henry Monaghan, and Ricky Revesz for their thoughtful comments and to David Richards and Samuel Rosh for excellent research assistance.

## INTRODUCTION

Is there really a “sex bureaucracy” in higher education today and, if yes, is that necessarily a bad thing? The answer depends, in significant part, on how one thinks about bureaucracies and their relationship to the student-related work of colleges and universities.

In *The Sex Bureaucracy*, Jacob Gersen and Jeannie Suk argue that the federal government has made a troubling intrusion into “ordinary sex”<sup>1</sup> through bureaucratic regulations and mandates related to sexual harassment and assault on college campuses. While they support some federal regulation,<sup>2</sup> they argue that the federal government has taken an overly broad view of what constitutes impermissible sexual conduct. Moreover, they argue, the government overstepped by requiring schools to enforce policies and engage in prevention-related work reflecting that flawed position.<sup>3</sup> They add: “The education of captive and impressionable youth is an effective context for training in bureaucratically sanctioned sexual norms.”<sup>4</sup>

This brief responsive essay identifies three features of the higher-education context that can help enrich *The Sex Bureaucracy*’s account of why schools have adopted new policies and developed enhanced trainings to address sexual assault on their campuses. In particular, these features bear on *The Sex Bureaucracy*’s claims that (1) federal law and policy developments<sup>5</sup> have spawned “mini-bureaucracies” at schools,<sup>6</sup> and (2) those mini-bureaucracies,

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1. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 884 (2016). Gersen and Suk define “ordinary sex” as “voluntary adult sexual conduct that does not harm others.” *Id.* at 885.

2. *Id.* at 886.

3. They argue that “[c]olleges and universities are particularly important loci of the sex bureaucracy,” *id.* at 884, and define that bureaucracy as having four interactive elements:

First, the leveraging of the concept of crime to regulate conduct that is not criminal, through federal reporting requirements that in effect extend to ordinary sex. Second, the federal oversight of institutional policies and procedures used for disciplining sexual conduct. Third, public health and risk reduction models for sexual-violence prevention that regulate conduct traditionally in the domain of morals regulation, like pornography and sexual fantasy. Finally, federal mandates to perform research on sexual climate that in effect constructs the sexual climate and promotes certain understandings of sex.

*Id.* at 891.

4. *Id.* at 884.

5. Some states have also intervened significantly in this area, including California, which passed the first “affirmative consent” law in the nation, and New York, whose “Enough is Enough” law also mandated that higher-education institutions in the state require affirmative consent in sexual interactions between students. *See* CAL. EDUC. CODE § 67386 (West 2016); *see also* N.Y. EDUC. LAW § 6441 (McKinney 2015).

6. Gersen and Suk also present an extensive, serious critique of the Department of Education’s Office of Civil Rights’ authority to elaborate Title IX through various guidance statements and enforcement actions and of the policy choices reflected in those efforts. I do not address this analysis here except to the extent I argue for giving greater attention to schools’ noncompliance-related interests in shaping their campus cultures.

like their federal counterparts, have crept into regulating “voluntary adult sexual contact that does not harm others.”<sup>7</sup> Taken together, the features also suggest that many of the changes schools have made, including those prompted by federal mandates, would likely remain in place even if federal intervention shrinks in ways consistent with *The Sex Bureaucracy*’s critique.<sup>8</sup>

The first of these features is the preexisting bureaucratic and administrative apparatus that virtually all schools have in place to govern a wide range of student conduct, from academic integrity to health to vandalism and nonsexual assault. Understanding basic elements of this framework is essential for assessing policies and practices that focus on addressing sexual misconduct.

The second feature is the educational mission of these institutions. This focus on student learning, coupled with new data and heightened campus engagement on these issues, can have an influence that is at least as powerful as federal mandates on schools’ efforts to address sexual interactions between students that negatively affect educational opportunity.

The third feature is the difficulty associated with developing effective educational programming on these issues. To the extent schools want students to absorb their messages about policies and institutional culture, their trainings must be interesting and engaging. Grappling with this pedagogical challenge will strengthen any critique of those trainings, including the one offered by *The Sex Bureaucracy*.

Taking these three factors into account, we can see that while federal intervention has had a profound effect, it is just one piece, albeit an important one, of a larger, complex puzzle.

## I.

### THE STUDENT POLICY BUREAUCRACY

While sparkling admissions websites advertise the enrichment and fun of college and graduate school life, students also enter a web of policies and enforcement mechanisms from the moment they agree to attend a higher-education institution—some required by federal or state law and others imposed by the school itself. Rules about everything from immunizations to financial aid receipt to illegal file downloading must be learned and followed, many before a student even sets foot on campus.<sup>9</sup>

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7. Gersen & Suk, *supra* note 1, at 885. The article defines administration as “the task of day-to-day operation of an organization” and bureaucracy as “a particular organizational form” for handling administration. *Id.* at 885 n.10.

8. See *infra* Part II.A. In addition, on many campuses it is likely that a subset of students, administrators, and perhaps even students’ parents and caregivers have come to see these enhancements as part of the school’s landscape and would resist their removal. See *infra* Part II.B; see also *infra* notes 23–24.

9. On immunizations, for example, the federal government’s website, [www.vaccines.gov](http://www.vaccines.gov), identifies several vaccines recommended for college students and notes that some, such as one that

Once in school, students must likewise follow rules governing academic integrity and day-to-day behavior, each with an accompanying mechanism for enforcement should allegations of misconduct occur. Via policy and procedure, schools reach into students' lives not only to oversee their academic endeavors but also to monitor, for example, their alcohol and drug possession and use, their treatment of others, and even the ways they use their rooms if they live in university-owned housing.<sup>10</sup> Typically, fellow students as well as faculty and staff can initiate the policy-violation charges that trigger an investigation and enforcement process.<sup>11</sup>

Nearly all of these rules shape the campus climate and the culture of student interactions as they filter into the community through orientation sessions and student-life handbooks. Patterns and practices of enforcement are also influential; even though underenforcement may be the norm at many institutions,<sup>12</sup> students often structure their social and academic interactions in

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protects against bacterial meningitis, "may be required for certain college students (requirements vary by state)." See *College & Young Adults*, VACCINES.GOV, [http://www.vaccines.gov/who\\_and\\_when/college/](http://www.vaccines.gov/who_and_when/college/) [https://perma.cc/EKE9-XXCY] (last visited July 1, 2016); see also, e.g., *Immunization Handbook for Post-Secondary Institutions*, N.Y. STATE DEP'T OF HEALTH, <http://www.health.ny.gov/prevention/immunization/handbook/> [https://perma.cc/7QUK-459R] (last visited July 1, 2016) (detailing vaccinations required of students at post-secondary institutions in the state of New York). Regulations regarding financial aid are substantial as well. See *Eligibility*, STUDENTAID.GOV, <https://studentaid.ed.gov/sa/eligibility> [https://perma.cc/7NHR-W78T] (last visited July 1, 2016). These regulations interact with schools' own standards for academic progress. See *id.* Schools likewise monitor file downloading at the behest of federal law. See, e.g., Morgan Baskin, *Think Twice Before Illegally Downloading – Intellectual Property Companies Are Watching You*, USA TODAY (Mar. 5, 2015, 3:51 PM), <http://college.usatoday.com/2015/03/05/think-twice-before-illegally-downloading-intellectual-property-companies-are-watching-you/> [https://perma.cc/48UA-3ZLC] (describing file downloading rules and stating that "[i]ncreasingly, universities are using the services of third-party companies like Rightscorp to monitor illegal network activity").

10. Prohibitions against candles, halogen lights, and cooking are quite common as are rules about when and the extent to which noise is permitted. See, e.g., Alexandra Tilsley, *Some Like It Quiet*, INSIDE HIGHER ED. (Nov. 6, 2012), <https://www.insidehighered.com/news/2012/11/06/students-who-prefer-books-parties-colleges-offer-quiet-housing-maintain-academic> [https://perma.cc/Z4BD-MPPB] (discussing noise regulation). Nearly all schools' residential life policies are quite detailed regarding halogen bulbs, candles, paint, and other items students may not use in their dorms. See generally Elizabeth DeMeo, *8 Dorm Items NOT to Bring to College*, EDUCATION.COM (May 8, 2013), <http://www.education.com/magazine/article/dorm-items-do-not-bring/> [https://perma.cc/6VHE-JP8U]. Schools also typically have antidiscrimination and antiharassment policies that students must likewise follow in their interactions with each other. One need only Google "student handbook" and "anti-harassment" to find hundreds of examples.

11. At schools with honor codes, students sometimes have an affirmative duty to report violations. See Jessica Cheung, *The Fading Honor Code*, N.Y. TIMES (April 11, 2014), <http://www.nytimes.com/2014/04/13/education/edlife/the-fading-honor-code.html> [https://perma.cc/Y4GY-FLND]; see also Larry DiMatteo & Don Wiesner, *Academic Honor Codes: A Legal and Ethical Analysis*, 19 S. ILL. U. L.J. 49, 75–76 (1994) (describing students' obligations to "self-police" the conduct of others).

12. See, e.g., Susan H. Greenberg, *Why Schools Should Ditch Honor Codes*, WASH. POST (May 28, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/28/why-colleges->

the shadow of these rules. The degree to which schools monitor underage drinking and similar activities, for example, is often well known and figures importantly even for prospective students when considering what life might be like on a given college campus.<sup>13</sup>

When enforcement does occur, a bureaucratic process of some sort must be invoked to determine what happened and, if necessary, to impose a fitting sanction. For infractions deemed serious, both suspension and expulsion are usually possibilities.<sup>14</sup>

In short, schools set out rules for misconduct and handle discipline on many issues, not just sexual assault. To find something uniquely bureaucratic about sexual misconduct policies and procedures is to miss the broader set of policies and procedures that governs students' lives.<sup>15</sup> There are important descriptive and normative questions about the relationship of sexual assault-related policies to these other campus rules that are well worth exploring.<sup>16</sup> But to treat schools' efforts regarding sexual misconduct in isolation from their broader disciplinary role risks obscuring this bigger picture.<sup>17</sup>

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should-ditch-honor-codes/ [https://perma.cc/U548-XBFW] (discussing limited enforcement of anti-cheating rules at several institutions).

13. Sally Rubenstein, *Ask the Dean: Balancing College School Work and Social Life*, C. CONFIDENTIAL, <http://www.collegeconfidential.com/dean/000241/> [https://perma.cc/S73K-V5ZR] (observing that "[s]ome places are renowned for their 24/7 parties, while—at the opposite extreme—are schools where strict rules keep socializing to a minimum and pose serious consequences for alcohol use").

14. Perry A. Zirkel, *Are Procedural and Substantive Student Challenges to Disciplinary Sanctions at Public Institutions of Higher Education Judicially More Successful than Those at Private Institutions?*, 41 J.C. & U.L. 423, app. c (2015) (reviewing numerous cases involving sanctions for varied student misconduct).

15. It bears noting that schools typically have policies and procedures related to nondisciplinary matters such as academic progress that can also include suspension or expulsion as sanctions. See, e.g., *Academic Standing Policies*, JOHNS HOPKINS U., <http://e-catalog.jhu.edu/undergrad-students/academic-policies/academic-standing/> [https://perma.cc/QRR8-YB5P] (last visited July 1, 2016). Likewise, for students with behavioral or mental health challenges that disrupt their ability to meet institutional expectations, there are administrative processes that evaluate and assess a student's conduct, potentially also resulting in required separation or withdrawal from the school. See, e.g., *University Student Conduct Policies*, N.Y.U., <http://www.nyu.edu/life/student-life/student-communitystandards/university-student-conduct-policies.html> [https://perma.cc/2JWT-ZVHE] (last visited July 1, 2016).

16. Schools vary, for example, in the sorts of protections and resources they provide to students who bring disciplinary complaints or are accused of violations outside of Title IX's coverage. It would be useful to understand these variations and to evaluate, from a normative standpoint, their consequences for the student body.

17. As Gersen and Suk make clear, the federal government's level of intervention in student discipline is distinct for Title IX-related issues as compared to many other areas of student life. See Gersen & Suk, *supra* note 1, at 907. There are many possible explanations for this distinct intervention, including the limited focus of Title IX and the particular disregard that many schools exhibited toward sexual misconduct relative to other forms of misconduct that affect students' experiences. A full exploration is beyond this essay's scope. Still, when evaluating the effects, rather than the origins, of sexual misconduct-related programs and policies on student interactions, seeing these programs and policies within the broader framework of the student disciplinary apparatus provides important perspective.

## II.

## THE HIGHER-EDUCATION MISSION: SUPPORTING STUDENT LEARNING

The education-focused missions of colleges and universities requires schools to work consistently on enabling students to learn and thrive in their programs. Consequently, while the Office of Civil Rights (OCR) of the Department of Education has unquestionably shaped policy and practice regarding sexual misconduct between students through its Title IX communications and enforcement, schools' educational missions also play an important role in prompting changes on campus.

*A. Schools' Interest in Improving the Learning Experience*

To be sure, schools are not necessarily better than other institutions at creating an environment that is free from sex and gender discrimination.<sup>18</sup> But if schools seek to educate all of their students, they will typically take steps within their capacity—including through policies, procedures, and support structures—they think appropriate to fulfill that mission.

For many schools, OCR's actions have been a serious, attention-getting prompt to respond to the effects of sexual misconduct on students' ability to thrive, or even remain, in school.<sup>19</sup> But there is good reason to believe that many schools would not revert to the status quo ante federal intervention<sup>20</sup> if

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18. See, e.g., Paula J. Caplan & Jordan C. Ford, *The Voices of Diversity: What Students of Diverse Races/Ethnicities and Both Sexes Tell Us About Their College Experiences and Their Perceptions About Their Institutions' Progress Toward Diversity*, 6 APORIA 30 (2014) (presenting research on students' experiences of belonging and inclusion related to gender and other factors, including race and ethnicity); Jane Roland Martin, *Bound for the Promised Land: The Gendered Character of Higher Education*, 4 DUKE J. GENDER L. & POL'Y 3, 8–15 (1997) (reviewing persistent challenges for women in higher education). As campus activism and advocacy regarding race and ethnicity on campuses has shown, higher-education institutions face a range of challenges in achieving inclusive educational communities in addition to those addressed by Title IX's prohibition on sex discrimination. See Alia Wong & Adrienne Green, *Campus Politics: A Cheat Sheet*, ATLANTIC (Apr. 4, 2016), <http://www.theatlantic.com/education/archive/2016/04/campus-protest-roundup/417570/> [<https://perma.cc/8WHA-MYPA>].

19. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1971 (2016) (discussing schools' inattention to these issues prior to OCR's 2011 intervention).

20. For example, the bystander intervention programs that *The Sex Bureaucracy* describes as seeking “to produce the sense that we are all implicated in the sexual environment and in protosexual interactions taking place around us,” Gersen & Suk, *supra* note 1, at 918, have actually proven to enhance students' willingness and ability to step up when they are concerned about troubling situations involving their peers. See, e.g., Ann L. Coker et al., *Multi-College Bystander Intervention Evaluation for Violence Prevention*, 50 AM. J. OF PREVENTATIVE MED. 295 (2016) (discussing data showing a bystander intervention program to be “a promising strategy for the prevention of sexual and other forms of violence victimization and perpetration among students”). Likewise, to the extent schools have developed effective programming for encouraging students to communicate with each other about consent, there will be, one hopes, a reduction in the number of incidents where students' sexual interactions have negative consequences for their well-being, both personally and academically.

OCR were to step back from its current position, perhaps in response to critique from *The Sex Bureaucracy* and other commentators.<sup>21</sup>

This is not to say that nothing would change; with the threat of Title IX investigation lifted, some schools might reallocate resources to other areas or return to the damaging skepticism toward sexual assault claims that was once the norm in many institutions.<sup>22</sup> More likely, perhaps, many schools would retain much of what they have adopted but shift away from OCR requirements that have proven unduly constraining or otherwise in tension with core campus values.<sup>23</sup>

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21. See, e.g., Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault (May 16, 2016), <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf> [<https://perma.cc/9LVJ-BC86>] (arguing that "OCR has unlawfully expanded the nature and scope of institutions' responsibility to address sexual harassment, thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding").

22. See *id.*; RANA SAMPSON, CTR. FOR PROBLEM-ORIENTED POLICING, INC., ACQUAINTANCE RAPE OF COLLEGE STUDENTS (2002), [http://www.cops.usdoj.gov/html/cd\\_rom/inaction1/pubs/AcquaintanceRapeCollegeStudents.pdf](http://www.cops.usdoj.gov/html/cd_rom/inaction1/pubs/AcquaintanceRapeCollegeStudents.pdf) [<https://perma.cc/MZ25-BXBL>] (discussing the reluctance of some college administrators to address the occurrence of sexual assault); Caroline Kitchener, *When Helping Rape Victims Hurts a College's Reputation*, ATLANTIC (Dec. 17, 2014), <http://www.theatlantic.com/education/archive/2014/12/when-helping-rape-victims-hurts-a-universitys-reputation/383820/> [<https://perma.cc/EA4D-H8RW>] (reviewing the rise and fall in attention to campus sexual assault during the late 1980s and early 1990s).

23. In particular, the no-mediation requirement in sexual assault cases, the strongly suggested sixty-day timetable, discouragement of student participation in the hearing process, and the insistence on a preponderance-of-the-evidence standard have been met with criticism or concern. For a critique of the mediation prohibition, see, e.g., Anonymous, *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students> [<https://perma.cc/6PNW-RBY4>]. The student affairs administrator who authored this open letter described a challenging scenario and offered this observation:

... I wish I had been able to bring these students together, to talk about what had happened, given them each a chance to air their grievances, respond, learn from what had happened. I have done that countless times in my office — mediated and sorted through differences between students who have behaved badly toward each other. I think this male student might have learned a lot about how to treat women. And perhaps these women would have learned something about self-respect, agency, their own perception of the place of sex in a relationship.

*Id.* But the Dear Colleague Letter says clearly that "In cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis." *Id.*

The recommended sixty-day timetable for resolving complaints has also proven difficult for many schools to meet when investigating and adjudicating complex cases. *Cf.* COLUMBIA UNIVERSITY, GENDER-BASED MISCONDUCT PREVENTION AND RESPONSE 2015–16 ANNUAL REPORT at 20, [http://sexualrespect.columbia.edu/files/sexualrespect/content/Gender-Based-Misconduct-Prevention-and-Response-2015-2016\\_final.pdf](http://sexualrespect.columbia.edu/files/sexualrespect/content/Gender-Based-Misconduct-Prevention-and-Response-2015-2016_final.pdf) [<https://perma.cc/JK8U-3TC5>] (listing the following as factors that cause delay: "The complainant initially declined participation in the investigation but then changed this decision; the complainant or respondent was out of the country and unable to participate in the investigation; difficulty was experienced when contacting the parties and/or witnesses; difficulty was experienced in the process of obtaining attorney-advisors and securing their presence for investigative interviews and other meetings; and the complainant and/or respondent were on leave from the University").

*B. The Power of Environmental Factors (Other Than OCR): New Data, Student Activism and the Endowment Effect*

Still, we are in a different environment today than we were five years ago with respect to available data, awareness of that data, and student activism. Earlier data on students' experience of sexual assault and other sexual misconduct<sup>24</sup> have since been replicated repeatedly and in large scale, both by campus climate surveys<sup>25</sup> and by the Department of Justice's analysis showing that women ages eighteen to twenty-four face heightened vulnerability to sexual assault, whether in or out of school.<sup>26</sup> Additional data confirm the substantial public health risk and other costs of sexual and relationship violence.<sup>27</sup>

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Some schools, which traditionally allowed student participation in disciplinary processes, also would likely return to allowing students to serve on hearing panels or otherwise participate in resolving Title IX matters. *Cf.* Allie Grasgreen, *Tide Shifts on Title IX*, INSIDE HIGHER ED (Apr. 24, 2012), <https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc> [<https://perma.cc/L48N-5W5K>] (discussing the tradition of student governance in misconduct matters, which was restructured after the 2011 Dear Colleague letter from OCR).

In addition, OCR's insistence on preponderance of the evidence rather than clear and convincing as the evidentiary standard schools are to apply in sexual assault cases is perhaps the most controversial aspect of OCR's action. For a critique, see, e.g., Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> [<https://perma.cc/5AVF-5J6F>].

24. See, e.g., Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162 (1987) (describing research).

25. See generally DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [<https://perma.cc/J7M3-5ZGS>]. I agree with Gersen and Suk that the conduct of climate surveys might have an effect on students' understanding of policy. See Gersen & Suk, *supra* note 1, at 918–24. The actual effect, however, would be difficult to measure. It bears noting that colleges and graduate students are surveyed frequently throughout the academic year by a broad array of information seekers who call attention to their behaviors and numerous other factors that shape their environment. See, e.g., AM. C. HEALTH ASS'N, FALL 2015 REFERENCE GROUP DATA REP. 8 (2015), <http://www.acha-ncha.org/docs/NCHA-II%20FALL%202015%20REFERENCE%20GROUP%20DATA%20REPORT.pdf> [<https://perma.cc/RW75-A83D>]; see also CTR. FOR POSTSECONDARY RES., INDIANA U., NAT'L SURV. OF STUDENT ENGAGEMENT: NSSE 2015 OVERVIEW (2015), [http://nsse.indiana.edu/2015\\_institutional\\_report/pdf/NSSE%202015%20Overview.pdf](http://nsse.indiana.edu/2015_institutional_report/pdf/NSSE%202015%20Overview.pdf) [<https://perma.cc/FS3Y-35QF>].

26. SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUST. STATS., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 (2014), <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [<https://perma.cc/5W4Y-VK4M>].

27. See *supra* note 25; see also NAT'L CTR. FOR INJURY PREVENTION & CONTROL, COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 27–32 (2003), <http://www.cdc.gov/violenceprevention/pdf/ipvbook-a.pdf> [<https://perma.cc/Z6QD-DJSM>]. For an anecdotal discussion of the costs of sexual assault on campus, see Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), <http://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html> [<https://perma.cc/7DDA-YGP6>].



Sustained media attention has raised awareness of this data throughout the country.<sup>28</sup> Elected officials have further propelled awareness, decrying the harms to women and others affected by sexual assault on college campuses nationwide.<sup>29</sup>

Consequently, although some schools may be adopting the enthusiastic consent policies criticized by *The Sex Bureaucracy* for the sole purpose of avoiding an OCR investigation, it is plausible and even likely that schools are crafting policies they believe will best support their students' educational experience in light of this changing awareness.<sup>30</sup> That is, they might conclude, based on the high reported rates of nonconsensual sexual contact as well as what they know about the cognitive capacity, life experience, and developing judgment of their students,<sup>31</sup> that this type of bright line provides clarity needed to reduce the incidence and related harms of nonconsensual sexual conduct.

Might there be other policy approaches? Yes, certainly. But the enactment of an enthusiastic consent approach may well speak less to a desire to inculcate particular sexual values, as *The Sex Bureaucracy* suggests,<sup>32</sup> than to a desire to

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28. See, e.g., Tara Golshan, *Why the Stanford Sexual Assault Case Has Become a National Flashpoint, Explained*, VOX (June 7, 2016, 4:00 PM), <http://www.vox.com/2016/6/7/11866390/brock-turner-stanford-sexual-assault-explained> [https://perma.cc/FL2S-WNM2]. This increased awareness extends beyond college campuses, as reflected by the more than one million people who signed a petition to recall a California judge who imposed a six-month jail sentence on a former Stanford University student convicted of raping a woman he met at a fraternity party. See Emily Bazelon, *Why the Stanford Rape Trial Actually Represents Progress* N.Y. TIMES, June 9, 2016, <http://www.nytimes.com/2016/06/09/magazine/why-the-stanford-rape-conviction-actually-represents-progress.html>; Ashley Fantz, *Outrage over 6-month Sentence for Brock Turner in Stanford Rape Case*, CNN.COM (June 7, 2016, 8:45 AM), <http://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford/> [https://perma.cc/7HGH-VPQR].

29. See, e.g., Barack Obama, *Remarks by the President at "It's On Us" Campaign Rollout* (Sept. 19, 2014), <https://www.whitehouse.gov/photos-and-video/video/2014/09/19/president-obama-speaks-launch-it-s-us-campaign#transcript> [https://perma.cc/6REF-FEBB]; see also Ciara McCarthy, *Joe Biden Gives Charged Speech on Campus Sexual Assault: 'It is a Crime, Period,'* THE GUARDIAN (Apr. 5, 2016), <https://www.theguardian.com/us-news/2016/apr/05/joe-biden-campus-sexual-assault-university-of-pittsburgh> [https://perma.cc/B8E8-4NDY].

30. See *infra* Part III. According to the National Center for Higher Education Risk Management, roughly 1,400 higher-education institutions require affirmative consent in their student policies governing sexual misconduct. Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (July 28, 2015), <http://www.nytimes.com/2015/08/02/education/edlife/affirmative-consent-are-students-really-asking.html> [https://perma.cc/CJ2U-SJZ5].

31. For discussion of the relationship between adolescent and young adult cognitive capacity and decision making, see, e.g., Craig M. Bennett & Abigail A. Baird, *Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study*, 27 HUM. BRAIN MAPPING 766, 770, 772 (2006) (finding that "changes in brain structure that occur during the first year of college" are related to behavioral self-regulation); cf. ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 35–49 (2010) (addressing adolescent cognition and criminal law).

32. The authors state, "In the course of sexual violence prevention, many schools have folded into the consent rubric a set of normative views on good sex and good relationships . . . [and] promote[d] normative relationship values such as respect, honesty, care for feelings, and nontraditional sex roles." Gersen & Suk, *supra* note 1, at 924–25.

reduce the incidence of harm known to negatively affects students' educational experiences.<sup>33</sup>

In addition, students have become much more willing to seek—and sometimes demand—their schools' engagement and support related to sexual misconduct. Here, I am thinking not only of student activists engaged in highly visible protests but also of student governments and other student leaders who identify the issue as an important one for their institutions to address.<sup>34</sup> Unlike in earlier decades of activism on these issues, students now expect their schools, through administrators and sometimes faculty, to step in and address what they see as a problem in their learning environments.<sup>35</sup>

Further, with these shifts in the landscape, students at many institutions have demonstrated a sense of ownership over or entitlement to the new policies

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33. As we think about the role of law in prompting change on campus, it may also be useful to think about schools' responses to recent student activism regarding race and ethnicity on campus. *See, e.g.,* Anemona Hartacollis & Jess Bigood, *Racial Discrimination Protests Ignite at Colleges Across the U.S.*, N.Y. TIMES (Nov. 11, 2015), <http://www.nytimes.com/2015/11/12/us/racial-discrimination-protests-ignite-at-colleges-across-the-us.html> [https://perma.cc/MM26-M9BK]. There is a relevant legal regime in state and federal antidiscrimination law that could prompt schools to take steps toward a more meaningfully diverse and inclusive community. But law has rarely been the focus of the conversations or the driver of changes that have occurred. While this is not a perfect analogy in that the federal government has not sought to regulate campus-based race discrimination vigorously, unlike its action in the area of sexual misconduct, it is nonetheless notable that many schools have sought to address student concerns without the “stick” of regulation—reinforcing that regulation is not the exclusive or necessarily most important prompt for institutional action. *Cf.* John Eligon, *After Racial Episodes, Blunt Discussions on Campus*, N.Y. TIMES (Feb. 3, 2016), <http://www.nytimes.com/2016/02/07/education/edlife/university-of-missouri-struggles-to-bridge-its-racial-divide.html> [https://perma.cc/3HQB-6B46]. Far more salient are claims about justice and fairness founded in aspirations for an environment free from race- and ethnicity-related barriers to full participation. *See generally* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006) (elaborating the concept of full participation).

34. *See, e.g.,* Graduate Student Senate, *Sexual Assault Committee*, WASH. U., <https://gradpages.wustl.edu/gss/student-health-services-sexual-assault-advisory-panel> [https://perma.cc/W6ZB-R5YJ] (last visited July 2, 2016) (explaining that the committee's mission is “to raise awareness about the unique needs of graduate students at Washington University concerning sexual assault, harassment, and violence” and to “advocate prevention with the aim of reducing the risk of unwanted sexual behavior within the graduate student community”); *see also* Nina Drumsta, *Student Government Hosts Sexual Assault Prevention Week*, E. ECHO (Feb. 2, 2016, 9:38 PM), <http://www.easternecho.com/article/2016/02/student-government-hosts-sexual-assault-prevention-week> [https://perma.cc/HZN4-8N53].

35. *See generally* LINDA LANGFORD, PREVENTING VIOLENCE AND PROMOTING SAFETY IN HIGHER EDUCATION SETTINGS: OVERVIEW OF A COMPREHENSIVE APPROACH (2012), <http://oregonsatf.org/wp-content/uploads/2012/05/preventing-violence-promoting-safety-highered.pdf> [https://perma.cc/SZS9-LY7J] (addressing the role of campus administrators in working with students, faculty, and others to address sexual assault and other violence on campus). Many students also participate in student-led activities on these issues. *See, e.g.,* Adela Uchida, *Student Led Initiative Hopes to Break Silence Against Sexual Assault at UT*, KEYETV (Apr. 6, 2016), <http://keyetv.com/news/local/student-led-initiative-hopes-to-break-silence-against-sexual-assault-at-ut> [https://perma.cc/JNS4-XVR9]; *see also* Guy Lasnier, *Student-Organized Events Highlight Sexual Assault Awareness Month*, U. CAL. SANTA CRUZ NEWSCENTER (Apr. 12, 2016), <http://news.ucsc.edu/2016/04/saam.html> [https://perma.cc/BF26-ZJCE].

and practices.<sup>36</sup> This, in turn, suggests that the backlash to large-scale change would be substantial and concerning to many schools, especially in a time when students are reportedly more likely than in recent decades to be willing to use protest as a means of expressing their views.<sup>37</sup> Consequently, many schools are also unlikely to embark on a wholesale rollback of the policy and resource changes they have made, even if OCR were to leave the field entirely.

In short, we can see that while OCR's actions were pathbreaking in their instigation of change, it is important not to lose track of other environmental factors. The interaction between OCR and these factors, such as new data, media coverage, and student engagement, is well worth further consideration as we parse why and how schools' policies and practices have changed.

### III.

#### POLICY TRAINING AND PEDAGOGY

Law and society scholars explain that our understanding of law and policy is shaped by many factors in addition to a provision's text.<sup>38</sup> As a result of these influences, we may structure our conduct in ways that result in over- or under-compliance with governing rules.

Along these lines, *The Sex Bureaucracy* expresses a particular concern that schools, at the behest of federal authorities, are providing education and training to students that go far beyond basic prohibitions against nonconsensual sexual contact:

The sex bureaucracy has conscripted colleges and universities as bureaucrats of desire. Within each of their mini-bureaucracies, college sex bureaucrats understand their regulation endeavors as federal legal compliance. These sex bureaucracies are not simply training students on the rules of rape, sexual assault, and sexual harassment. They are

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36. As research has shown, the endowment effect, by which individuals and groups value what they feel they own, is "not limited to cases involving physical goods or to legal entitlements." Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1345 (1990). As Cass Sunstein suggests, this endowment effect can carry over to default rules adopted by schools for handling complaints related to sexual misconduct, reinforcing the relevance of factors other than OCR in a school's consideration of whether to retain the policies that it might have changed initially at OCR's prompting. See Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 119 (2002) (arguing that default legal rules "can create an endowment effect, making employees value certain rights more, simply because they have been granted such rights in the first instance").

37. Courtney Kueppers, *Today's Freshman Class Is the Most Likely to Protest in Half a Century*, CHRONICLE OF HIGHER EDUC. (Feb. 11, 2016), [http://chronicle.com/article/Today-s-Freshman-Class-Is/235273?cid=at&utm\\_source=at&utm\\_medium=en&elq=0807ae349ddf46d48644ae30ceff9cb2&elqCampaignId=2420&elqaid=7858&elqat=1&elqTrackId=ea9326aab1a3499aa5bf0efe9fd69180](http://chronicle.com/article/Today-s-Freshman-Class-Is/235273?cid=at&utm_source=at&utm_medium=en&elq=0807ae349ddf46d48644ae30ceff9cb2&elqCampaignId=2420&elqaid=7858&elqat=1&elqTrackId=ea9326aab1a3499aa5bf0efe9fd69180) [https://perma.cc/KL8U-UGUM].

38. See, e.g., Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 810 (2007) (describing the way in which government workers can steer choices "not through any official grant of discretion" but instead through their communications with constituents that reflect a worker's "ignorance, impatience, or normative views").

instructing students on matters such as what is “sexy,” what constitutes “great sex,” what are “positive relationships,” and the like. They are instructing on, advising on, counseling on, defining, monitoring, investigating, and adjudicating questions of sexual desire.<sup>39</sup>

In describing what it terms “the foreplay bureaucracy,”<sup>40</sup> the article offers numerous examples, such as, “It is not sexy to have sex without consent!” and “Why is consent sexy? . . . [Because it] makes sex and relationships better.”<sup>41</sup> The article also quotes Yale’s Annual Security Report, which states that students are told to “[c]ommunicate with [their] sexual and romantic partners,” as “[o]pen discussion of desires and limits is a critical part of building a positive sexual culture.”<sup>42</sup>

Trainings, including ones that include these sorts of statements and recommendations for action, surely have the potential to shape how students understand the policies that govern their conduct, especially since relatively few students are likely to read policies on their own. My point in this Section is that just as there is value in considering schools’ broader disciplinary apparatus and educational missions when evaluating work in this area, it is also useful to be realistic about what these statements and related trainings are likely to accomplish. It is helpful, as well, to consider the extent to which schools’ own interests, rather than federal mandates, are driving the messages being delivered.

Turning first to the impact of schools’ statements and trainings, we know from work in the field<sup>43</sup> that rarely do trainings have an enduring impact on knowledge and beliefs, let alone behavior.<sup>44</sup> One typically needs a small group

39. Gersen & Suk, *supra* note 1, at 924.

40. *Id.*

41. *Id.* at 926. Among the many additional examples they provide is this from the University of Georgia:

Show your partner that you respect her/him enough to ask about her/his sexual needs and desires. If you are not accustomed to communicating with your partner about sex and sexual activity the first few times may feel awkward. But, practice makes perfect. Be creative and spontaneous. Don’t give up. The more times you have these conversations with your partner, the more comfortable you will become communicating about sex and sexual activity. Your partner may also find the situation awkward at first, but over time you will both be more secure in yourselves and your relationship.

*Id.* at 927.

42. *Id.* at 925.

43. Personal experience is at least as persuasive on this point as empirical research. Think, for example, about trainings you have attended or completed online. How much of the substance—as opposed to the room, the leader, your training-mates, or perhaps a photo in an online tutorial—do you remember? And how much did your behavior change as a result of what you learned? For most people, the answer to both questions reinforces the point that impactful trainings are more the exception than the rule—and that interactivity and entertainment or other emotional engagement is usually essential for information retention.

44. See generally Nick Andersen & Peyton Craighill, *College Students Remain Deeply Divided Over What Consent Actually Means*, WASH. POST (June 14, 2015), [https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e\\_story.html](https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html)

and a talented facilitator, along with additional positive factors, for participants to engage in a way that enables them to absorb and retain the information being shared.<sup>45</sup> “Dosage” is critical as well. While multiple, interactive discussions over time make a difference, one-shot orientation sessions are unlikely to have the impact on either thought or behavior that *The Sex Bureaucracy* anticipates.<sup>46</sup>

With this in mind, put yourself in the position not just of a student but of a student attending an orientation session at a new school. Information overload is the norm. Social anxiety is high. Someone comes in to do a workshop on the school’s rules related to sexual misconduct and its expectations for how students should treat each other. What would keep your attention? If you were leading this workshop, what might you do to keep your audience listening and learning rather than fiddling with their phones and laptops and hoping that this discussion with near-strangers about sex and relationships will quickly come to an end? The challenge in some ways is similar to keeping a classroom audience engaged on any difficult topic—except that this one is not at an academic remove. It is intensely personal and focuses on interactions that most people prefer not to discuss in groups, let alone in groups of people who they have just met.

In other words, while there are ready critiques for “consent is sexy” and similar campaigns,<sup>47</sup> if the goal is to have students absorb even basic points about consent, it is not likely that a technical discussion limited to the text of a sexual misconduct policy will get much traction during orientation, if ever. To state the obvious, an interesting training will be more impactful than a boring

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[<https://perma.cc/8Y3Z-D4H4>] (discussing results of a *Washington Post*–Kaiser Family Foundation Poll).

45. See Linda A. Anderson & Susan C. Whiston, *Sexual Assault Education Programs: A Meta-Analytic Examination of Their Effectiveness*, 29 PSYCHOL. OF WOMEN Q. 374, 382–83 (2005) (reviewing multiple programs); cf. Benjamin E. Liberman, Caryn J. Block, & Sandy M. Koch, *Diversity Trainer Preconceptions: The Effects of Trainer Race and Gender on Perceptions of Diversity Trainer Effectiveness*, 33 BASIC & APPLIED SOC. PSYCHO. 279 (2011) (assessing the ways in which aspects of a trainer’s identity can affect an audience member’s experience of a training).

46. Catherine J. Vladutiu et al., *College- or University-Based Sexual Assault Prevention Programs: A Review of Program Outcomes, Characteristics, and Recommendations*, 12 TRAUMA, VIOLENCE & ABUSE 67, 80 (2011).

It is also not clear that trainings have had an impact on students’ inclination to bring disciplinary complaints related to nonconsensual sex or other misconduct. Although each case can be profoundly consequential for those involved, the actual number of complaints that are investigated and adjudicated is extremely small and is likely to remain so. The reasons for this are many. According to the largest national survey of college and university students, the primary reason students chose not to report incidents they characterized as sexual assault, including nonconsensual penetration, is that they did not consider the incidents “serious enough.” See CANTOR ET AL., *supra* note 25, at iv.

47. *The Sex Bureaucracy* argues that these trainings “serve[] the sex bureaucracy’s construction of an acceptable framework for the expression and gratification of sexual desire.” Gersen & Suk, *supra* note 1, at 925. With examples from several schools, they add that “[t]he distinction between ‘consensual sex’ and ‘good sexual relationships’ is eroding.” *Id.*

one.<sup>48</sup> Indeed, just as schools have an administrative apparatus to enforce a variety of policies, schools regularly use a variety of techniques—including skits, games, and other less traditionally didactic activities—to keep students engaged for sensitive discussions of alcohol, mental health care, and living in a diverse environment.<sup>49</sup>

Further, the stated aim of many orientation sessions, especially for new undergraduates in residential settings, is not only to convey policy requirements but also to support an environment in which students interact with mutual respect across their differences. From this vantage point, and in light of data showing that nonconsensual sexual contact occurs with some frequency among students,<sup>50</sup> schools must of course address sexual interactions and would have an interest in trying to make the training as engaging as possible.<sup>51</sup>

Still, one might argue that these trainings go too far, that enthusiastic or even affirmative consent is not required for the consensual interactions that the law requires,<sup>52</sup> and that for a higher-education institution to suggest otherwise is to overstep.<sup>53</sup> Here I return to a point from above, which is that schools choose to guide their students toward mutually respectful interpersonal conduct

48. Even further, a dry training that covers the policy and related required content but seems to make no effort to engage the audience is more likely to be caricatured as a “check the box” compliance effort than one that is interesting and perhaps even fun for participants.

49. Beth Howard, *How Colleges Are Battling Sexual Violence*, U.S. NEWS (Aug. 28, 2015, 2:58 PM), <http://www.usnews.com/news/articles/2015/08/28/how-colleges-are-battling-sexual-violence> [https://perma.cc/ES4Q-SWKA].

50. See *supra* text at notes 25-26..

51. *The Sex Bureaucracy*’s contention is that “[w]ithin each of their mini-bureaucracies, college sex bureaucrats understand their regulation endeavors as federal legal compliance. These sex bureaucracies are not simply training students on the rules of rape, sexual assault, and sexual harassment. They are instructing students on matters such as what is ‘sexy,’ what constitutes ‘great sex,’ what are ‘positive relationships,’ and the like.” Gersen & Suk, *supra* note 1, at 924.

52. Some jurisdictions now require higher-education institutions have “affirmative consent” as their policy standard. New York, for example, defines affirmative consent as a “knowing, voluntary, and mutual decision among all participants to engage in sexual activity.” N.Y. EDUC. LAW § 6441 (McKinney 2015); see also CAL. EDUC. CODE § 67386(a)(1) (West 2016) (“‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.”).

53. *The Sex Bureaucracy* indicates that some schools have defined consent to require enthusiasm, Gersen & Suk, *supra* note 1, at 926, but definitions that refer to enthusiasm and other similar qualifiers are typically for educational rather than policy purposes. For example, Oklahoma State University has a web page with an in-depth discussion of consent that refers to imagination and creativity in addition to explaining that “effective consent” is “freely and actively given” with “mutually understandable words or actions.” See *What Is Consent?*, OKLA. ST. U., <https://1is2many.okstate.edu/consent> [https://perma.cc/PS9Q-B2YV] (last visited Sept. 12, 2016). Yet, it also clarifies that the information on the page “is not the effective consent policy but to be used for informational, educational, and preventative purposes.” See *id.*

in many realms, both in class and in residential settings. Perhaps there is something distinctively sacred about sexual interactions that ought to be protected from this type of intervention. To make this case, though, it is useful to take seriously a school's interest in meaningfully reducing the frequency and costs of nonconsensual sexual conduct and addressing the challenges students face in recognizing others' lack of consent or communicating their own.

One might contend, further, that the fault is OCR's, which caused, or at least encouraged, schools to generate trainings that now seek to infiltrate the ways that students think about and have sex. Yet to be required by OCR to provide policy information and related training about sexual misconduct to all students is very different from being told how the training should be delivered. Put simply, schools are not without agency in how they conduct these trainings of their students.

To be clear, the question of how trainings impact understanding and enforcement of policy is deeply interesting and important. In evaluating the current state of college and university efforts to address nonconsensual sex between students, however, it is also important not to overstate the impact of trainings on students' beliefs and behavior or to understate the institutions' own interests in the trainings they develop.

#### CONCLUSION

In a time when the law, policy, and social norms related to nonconsensual sex on college campuses are more dynamic than ever before, it is well worth examining whether federal regulators or schools themselves are overstepping in an effort to address past failures to take this conduct seriously. Yet it is also important to consider these institutional efforts in the context of schools' educational missions and student oversight responsibilities more generally.

In other words, the structures that colleges and universities have in place to administer sexual misconduct policies and to educate students with the aim of reducing nonconsensual sexual contact might well be described as bureaucratic in the sense that they have an organizational form and are staffed by individuals responsible for carrying out those tasks. But if we accept that it is appropriate for schools to respond to sexual misconduct on their campuses by educating students and enforcing policies, there is nothing inherent in these so-called bureaucracies that renders them necessarily different from—or more troubling than—myriad others that oversee student conduct.

Likewise, while recognizing the power of law to give direction to social interactions, it is also important not to overstate law's ability, standing alone, to shape culture and behavior. At the very least, there is synergy between the two. Perhaps even more likely, it is the space created by cultural change that has enabled new openings for law in this arena; yet it is also culture that will inevitably limit the impact of the law and of even the best-intentioned trainings to shape people's social interactions and their most intimate relationships.